

# EXHIBIT 22

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

SECURITIES AND EXCHANGE  
COMMISSION,

PLAINTIFF,

vs.

ROBERT J. MUELLER, ET AL,

DEFENDANTS.

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DOCKET NO. 5:21-CV-785-XR

TRANSCRIPT OF PRETRIAL CONFERENCE PROCEEDINGS  
BEFORE THE HONORABLE XAVIER RODRIGUEZ  
UNITED STATES DISTRICT JUDGE  
NOVEMBER 28, 2023

APPEARANCES:

FOR THE PLAINTIFF:

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UNITED STATES DISTRICT COURT  
SAN ANTONIO, TEXAS

1 marriages or divorces spent on the money, completely  
2 inflammatory and irrelevant, because the government's theory  
3 is he shouldn't have had that money. It should be the same  
4 whether he took that money down to the Food Bank and gave it  
5 all to the Food Bank.

6 But that's precisely why, Judge, even you, with your  
7 extensive experience there, having to call balls and strikes,  
8 if it's sticking in your mind, what's it going to do to a jury  
9 here when that's not part of the government's theory,  
10 according to them?

11 THE COURT: But it is relevant to the scienter, so  
12 that's the difference here. That's the ruling.

13 Moving on to three. Advice of counsel. So — why  
14 don't you just stay there.

15 So help me understand how your client told counsel  
16 everything — outside counsel everything they needed to know  
17 and that they provided a legal opinion that he relied on.

18 MR. DAVIS: Judge, I'd like to first talk about the  
19 first point that you raised, which is the full disclosure  
20 issue. And, you know, one of the cases cited by the SEC,  
21 the — it's kind of difficult — I think it's *Impastato*.

22 I'll get the spelling later.

23 THE COURT: I-M-P-A-S-T-A-T-O.

24 MR. DAVIS: Yes, Your Honor. I think it was a  
25 Louisiana case. But basically recognized — and I think the

1 *Snyder* case, too, recognized that that's a jury question; that  
2 the level of disclosure, whether it was full disclosure or  
3 not, should be submitted to the jury.

4           So this is not appropriate for a motion in limine  
5 saying you can't get into that. So that's the threshold  
6 issue. In fact, we cited directly that court's discussion of  
7 that, and I think the *Snyder* case just reinforces that. And  
8 that was a large part.

9           THE COURT: But, I mean, there's got to be enough  
10 fact issues to go to a jury. So tell me where are there fact  
11 issues that may go to a jury on this?

12           MR. DAVIS: Sure, Judge. I guess we'll put it into  
13 context.

14           If you read the SEC's motion, it creates the  
15 impression that Robert Mueller went to these lawyers, the  
16 securities lawyers, just prior to the PPM and said, "Hey,  
17 guys, I'm going to raise some money." That's not what this  
18 was.

19           What you had was over two and a half years of  
20 representation -- actually, two years and five months -- by  
21 these lawyers prior to that PPM that's the subject of this  
22 case, the first PPM. That's the real subject of this case.  
23 There are several, but that's the in-time.

24           So this argument, number one, that there wasn't full  
25 disclosure and that the lawyers weren't familiar with the

1 business is belied by the extensive experience and  
2 representation that they had these entities and Mr. Mueller,  
3 number one.

4 By "extensive," hundreds of thousands of dollars  
5 worth of legal bills and hours. Mr. Concilla described, Your  
6 Honor -- I think as he said, "We talked all the time." We had  
7 emails and phone calls all the time, consistent with  
8 Mr. Mueller's testimony.

9 So this notion that they weren't fully aware, having  
10 set up this structure for the business themselves, is just  
11 belied by the facts. So that description, Your Honor --  
12 obviously, we didn't question our own witness, Mr. Mueller,  
13 during his deposition, but you will hear testimony, and you  
14 see glimpses of it, even through the SEC questions of  
15 Mr. Mueller in his deposition about extensive and thorough  
16 discussions with his lawyers at all stages two and a half  
17 years leading up to the PPM.

18 Now, what they point to is Mr. Concilla's statements  
19 during his deposition that he couldn't recall certain things;  
20 that he does say there are lots of discussions. We were  
21 talking -- I think he almost said -- every day during the  
22 critical time.

23 Mr. Concilla was hospitalized, Your Honor, for a  
24 large period of time. We had to set up his deposition, you  
25 know, working around that. He was ill. There was a serious

1 illness. In fact, that's one of the reasons why we've agreed  
2 if he has to testify, to do it remotely at his request.

3 He's admitted candidly that he doesn't recall things.  
4 He's also admitted candidly that he wouldn't dispute if  
5 Mr. Mueller did recall things that he couldn't recall.

6 So -- but what we do have -- and that's why we cited  
7 so many clips -- is we have both Mr. Mueller and Mr. Concilla  
8 in their testimony -- and you'll hear more from Mr. Mueller --  
9 talked about the extensive discussions and advice into  
10 different areas leading up to the PPMs, which are the  
11 representations that are at issue in this case.

12 THE COURT: There was no, like, warranty letter or  
13 letter provided by counsel as to the parameters of the  
14 disclosures? Nothing like that?

15 MR. DAVIS: Not as to the -- you mean as to the scope  
16 of representation or as to the disclosure?

17 THE COURT: No, to the scope of, "this is to affirm  
18 that the following disclosures were made." I mean, the stuff  
19 you would normally see a lawyer recap.

20 MR. DAVIS: You know, I guess look at it from this  
21 perspective, Judge. You have Mr. Mueller going to these guys  
22 who are undisputedly veteran. I mean, the guy has 40 years.  
23 In all these offerings, I think the Court may have seen his  
24 resume in connection with some of the disclosures as a  
25 nonretained expert.

1           So what can Mr. Mueller do as a client but go to  
2 these folks and pay them top dollar, pay hundreds of thousands  
3 of dollars, and spend -- who knows? -- thousands of billable  
4 hours getting advice from them.

5           So if there aren't documents like that that other  
6 securities lawyers give, it shouldn't be on Mr. Mueller. Why  
7 is that important? It's important because Mr. Concilla, in  
8 his deposition, answered the following questions: "When you  
9 said 'We're done, I approve this,' did you mean that you  
10 approved all the disclosures and that this was acceptable and  
11 in compliance to give to investors?"

12           "Yes."

13           Over and over and over again. And in terms of the  
14 challenges, Judge, you know, when you look at the case law,  
15 the relevance issue is, well, our -- was the advice related to  
16 the issues that are at issue in this case? And that's why we  
17 cited so many excerpts, because both Mr. Mueller and  
18 Mr. Concilla describe the areas that are of concern in this  
19 case.

20           For example, loans and compensation. "Yes."

21           "Critically, when you blessed the PPMs, did you know  
22 that there was no revenue; in other words, that investor money  
23 was going to come in at a time when you knew that investor  
24 money or that company money was going to be paying these?"

25           "Yes, we knew that."

1           Now, Mr. Concilla said, "I don't recall a specific  
2 conversation about investor money being used to pay other  
3 investors," but he says, "If I had been asked, yes, I believe  
4 money is fungible, as long as there's money from other  
5 sources," which there was.

6           You will hear, Judge, that there was money from other  
7 sources in these accounts. There were both loans, and I think  
8 one or two of the policies had paid off. Then Mr. Concilla  
9 says there is nothing wrong with that. Money is fungible.

10           Mr. Mueller certainly will testify, he remembers  
11 those conversations in the context of this, and that was  
12 precisely why he proceeded and relied upon Mr. Concilla and  
13 the law firm.

14           So back to the Court's question, was there  
15 disclosure? You have two and a half years of evidence that  
16 will be uncontested of an attorney/client relationship  
17 specifically with these companies, the predecessors, going  
18 forward, that shows that these lawyers were very familiar with  
19 this operation and the structure. They set it up.

20           You have the testimony from Mr. Mueller and  
21 Mr. Concilla talking about the various different topics, and  
22 you have Mr. Mueller saying, "Yes, I relied upon them. Yes, I  
23 had these conversations."

24           If you read the SEC's brief, Judge, you think that  
25 specific conversations about these different areas that are at



1 issue never happened. We've given you sworn testimony of  
2 Mr. Mueller, even not in response to our questioning -- to  
3 their questioning -- talking specifically that he did get such  
4 advice.

5 That is the evidence that is necessary. If they have  
6 a challenge about the extent of that, then that is for the  
7 jury to decide. They can argue to the jury, well, they didn't  
8 tell them this. They didn't tell them that. But there's  
9 certainly enough evidence, Your Honor, to justify that issue  
10 being at play in this case.

11 THE COURT: So -- to the government.

12 So defendant says that they have provided some amount  
13 of information that should potentially be heard by the jury.  
14 I mean, why shouldn't I go on the safe side, allow them to do  
15 what they are going to attempt to do?

16 Mueller says whatever he's going to say, the attorney  
17 or attorneys -- plural -- say what they are going to say, then  
18 I decide whether or not the reliance on counsel argument can  
19 go to the jury. Perhaps, if you guys are correct, and it's  
20 not met, then I don't provide such an instruction, and I tell  
21 the jury to disregard all the evidence they previously heard  
22 on this point. Why isn't that the safer route?

23 MR. NASSE: Yes, Your Honor, I think it's exactly for  
24 the point you raised at the outset. There needs to be some  
25 modicum of facts behind some of these assertions of privilege.

1           And you -- at our last hearing, Your Honor, you  
2 specifically asked the defense counsel to provide you specific  
3 examples of where the lawyers were provided -- asked a  
4 specific question with the appropriate information and what  
5 their response was.

6           And here in the motion, you have, I think, ten to  
7 twelve pages of citations to the attorneys' depositions. And  
8 not a single one of them, if you look at them closely,  
9 indicate that there was a specific question asked about the  
10 issues in this case, the information they provided.

11           In fact, to the very issue where Mr. Davis just  
12 raised about Ponzi payments, the question they cited, where he  
13 says "money is fungible," but the entire quote is, "So  
14 wherever this money is coming from or if it's going into an  
15 account, it could be used for whatever purpose. But did we  
16 have a specific discussion of what I think you are asking,  
17 paying all investors with new investors' money? We did not."

18           So it's not that we didn't recall or some sort of a  
19 vague answer. It's "We did not."

20           THE COURT: What did Mr. Mueller say in his  
21 affidavit?

22           MR. NASSE: Mr. Mueller -- if you look at their  
23 statements, are vague assertions. We don't dispute that  
24 Carlile Patchen provided advice of the drafting of the initial  
25 documents. We're not saying that there are some technical --

1 THE COURT: That's not going to get them there.

2 MR. NASSE: Yeah. That's the -- and I think the case  
3 law is clear on that. It's what did they know after the fact,  
4 after those funds launched, his -- what his conduct was in  
5 relation -- in light of the representations in the PPMs.

6 His assertions are we had discussion -- our vague  
7 sort of statements of, we had discussions all the time. We  
8 talked about everything, but the very -- the citation that  
9 Mr. Davis mentioned about the loans, if you look at that  
10 entire transcript, you see me going repeatedly, like, asking  
11 Mr. Mueller: "Do you recall a specific conversation?"

12 "Well, we talked about everything. We talked about  
13 all kinds of -- we must have talked about it."

14 Those are his types of responses; whereas the  
15 lawyers, when they are deposed, are very definitive and say,  
16 "No, we did not," on all the core issues; whether there was a  
17 legally enforceable interest in the life policies or the  
18 affiliated business.

19 As you pointed out, what does capital acquisition  
20 mean? In fact, their testimony was exactly contrary to that.  
21 They expected there to be a legally enforceable interest in  
22 the entities that the funds were investing in. In fact, they  
23 said if they had known that there wasn't, they would have  
24 advised Mr. Mueller to amend the PPMs.

25 Whether he could use personal -- use investor funds

1 for personal expenses. There is no citation in any of their  
2 documents where -- that he provided -- asked that question  
3 specifically to Carlile Patchen and they provided any  
4 guidance.

5 Whether he could use -- they just cited -- pay  
6 returns to other investors with new investor money, whether he  
7 could use the company advance to pay those investors. They  
8 have views about what the document said, but at every  
9 opportunity, they always said they didn't have those specific  
10 conversations with Mr. Mueller.

11 So our view is in light of the fact that there's not  
12 a factual basis to introduce the supposed advice of counsel,  
13 the prejudice, Your Honor, outweighs the relevancy here.

14 THE COURT: So Mr. Davis, you are telling me that  
15 in -- and I can't pronounce the lawyer's name, and then your  
16 client's affidavit, those are the two places that you believe  
17 allow you to raise this to the jury. Is there any other  
18 places that you think support?

19 MR. DAVIS: Well, it's our client's testimony, Judge,  
20 from his deposition from the SEC, and it's what we anticipate  
21 he will testify to. I want to slow this down, because there  
22 are statements being made -- or if you just look, Your Honor,  
23 at what we have filed, there are some examples in there.

24 So, for example: "Did Carlile Patchen" -- that's the  
25 law firm where Mr. Concilla was -- "ever advise you that it

1 was permissible to pay existing investors with new investor  
2 investments?"

3 "Answer: Yes."

4 "Question: When did that occur?"

5 "Answer: It occurred continuously throughout the  
6 representation, including after there was a privilege waiver  
7 date."

8 "Question: Did you have a conversation where Carlile  
9 Patchen advised you it was permissible?"

10 "Answer: Yes. We had many conversations."

11 And he was adamant -- Mr. Concilla -- this is  
12 Mr. Mueller talking about Mr. Concilla.

13 THE COURT: You are citing from your client's --

14 MR. DAVIS: Deposition answers that are sworn, that  
15 are part of our response. Dennis was adamant about the  
16 provision that money was fungible. That's exactly what  
17 Mr. Concilla testified to.

18 Now, Mr. Concilla testified -- just as I said and as  
19 counsel said -- we didn't have those conversations. But when  
20 asked by Mr. Hulings in the deposition, he said, "You know,  
21 we're talking about eight years ago." He said, "Yes, it may  
22 have. Mr. Mueller could have a different recollection."

23 But Mr. Concilla says, "I know what I would have  
24 said," which is exactly how Mr. Mueller describes it; that  
25 money is fungible. It's not a Ponzi scheme if there are other

1 monies in the account.

2 Here's another example. Again, sworn testimony from  
3 our client. This was the SEC asking Mr. Mueller.

4 "Question: Did you ask Carlisle Patchen whether you  
5 should disclose that you would pay existing investors with new  
6 investor funds?"

7 "Answer" -- not vague, not equivocal -- "Yes. We  
8 talked about it several times."

9 The company advance section and the language therein  
10 was their response to these types of discussions.

11 So we cited Mr. Concilla's testimony. When  
12 Mr. Hulings asked Mr. Concilla, "Do you think that the company  
13 advance section could be used to pay investors?"

14 "Answer: Yes. That could be proper."

15 So is there evidence, Your Honor, that supports this?  
16 Yes. And I could keep going. For example, Mr. Concilla was  
17 asked -- it said:

18 "Question: You don't recall discussions with  
19 Mr. Mueller regarding placing 30 percent of investor funds  
20 into deeproot Pinball?"

21 Mr. Concilla said: "I do recall."

22 And they said: "What did he tell you about that?"

23 He said, "He thought it would allow some  
24 diversification of cash flow."

25 This is Mr. Concilla.

1 THE COURT: But where is that evidence that the  
2 lawyer is actually providing him advice?

3 MR. DAVIS: Because those conversations, Judge, are  
4 part of his advice and approval, which is what I'm getting to,  
5 the culmination of that, which is, yes, these PPMs, with my  
6 knowledge, based upon these discussions, are good to go. They  
7 are compliant with the securities laws, and may be presented  
8 to investors.

9 THE COURT: And there was no written memorialization  
10 of any of this?

11 MR. DAVIS: There's sworn testimony from  
12 Mr. Concilla, Judge.

13 So let me give you --

14 THE COURT: No. I'm still wrapping my head around  
15 this complex deal being put together by Carlisle Patchen and  
16 there is no formal letter blessing this.

17 MR. DAVIS: Well, that may be a mal -- well, there's  
18 a tolling agreement. That may be a malpractice issue, Judge,  
19 but we don't have to guess now, because what Mr. Concilla  
20 remembers is, quote, "Did you provide legal advice with  
21 respect to the PPMs?"

22 "Yes."

23 THE COURT: But there's no doubt about that. The  
24 question is what the representations were and did he bless the  
25 representations being made.

1 MR. DAVIS: Right, Judge, but the representations  
2 were in the PPM. Their point is that, well, he did -- the way  
3 it was actually set up, the way that it was working was  
4 inconsistent.

5 What this evidence, the sworn testimony, shows is  
6 that Mr. Concilla and his firm were very familiar with the  
7 structure and the setup, were very familiar with that. And so  
8 when you have Mr. Mueller, who obviously remembers -- he's on  
9 trial here. You have a securities lawyer, a 40-year veteran,  
10 who has been through a health crisis and isn't well enough to  
11 come to -- live here, asked to remember one of many, many  
12 clients' conversations eight years ago and says, "Yes,  
13 Mr. Mueller, I wouldn't doubt that he would remember this  
14 stuff" -- basically -- "better than me."

15 THE COURT: So we keep talking about one lawyer. I  
16 thought you guys were going to have more than one lawyer.

17 MR. DAVIS: There is two. They're both from the same  
18 firm. Mr. Concilla was the lead lawyer. There's a  
19 Mr. Federico. Honestly, I think Mr. Concilla was the lead  
20 lawyer, and he's probably the one we would call.

21 THE COURT: No, I'm talking about them.

22 MR. DAVIS: Oh, them.

23 THE COURT: Yes.

24 MR. NASSE: Yes, that's right, Your Honor. There is  
25 another lawyer, Mr. Federico. Same firm. He testified in his



1 deposition that he didn't advise Mr. Mueller on either PPM, so  
2 that was his testimony. He did advise him on other funds, but  
3 not these two PPMs.

4 *(Off-the-record discussion.)*

5 MR. DAVIS: I was going to say, Judge -- I mean  
6 again, we're getting to whether the Court should go down the  
7 safe route, and the U.S. versus -- or the *SEC versus Snyder*  
8 case actually goes directly to what you've said, Judge, which  
9 is why isn't it safer to listen to this and then make that  
10 decision.

11 In that case, the Fifth Circuit observed that, quote,  
12 "The defendant does not have the burden of proving any, quote,  
13 'elements' of the defense before the jury can weigh the  
14 defendant's theory of reliance."

15 And to deprive -- given the testimony, the sworn  
16 testimony already from Mr. Concilla and Mr. Mueller, to  
17 deprive Mr. Mueller of putting this information before the  
18 jury -- and at the end of this case, Your Honor, you can  
19 decide whether -- whatever decisions you want to make in terms  
20 of what written instruction, if any, get provided, not only is  
21 it the safe route, it's the route that's dictated by the Fifth  
22 Circuit and in fairness in this case.

23 When Mr. Concilla stated, "your opinion that you  
24 communicated to Mr. Mueller" -- this is an example, Judge --  
25 "was that the PPMs for the 575 Fund and the GRD Fund

1 adequately disclosed that he would be receiving compensation  
2 in some form."

3 He said implicitly, yes. He said, "I don't" —  
4 again, it doesn't speak to it specifically, but implicitly,  
5 yes.

6 So, again, we go back to where we started, which was  
7 we're going to talk about these expenditures. Mr. Mueller  
8 shouldn't have gotten that money. Kind of a strange theory.  
9 He shouldn't have been compensated. And here is direct  
10 testimony from Mr. Concilla, said, of course, you know, my  
11 advice included that area.

12 THE COURT: What about the alternative argument that,  
13 well, you invoke the attorney-client privilege at various  
14 times during the deposition of this Concilla?

15 MR. DAVIS: I'm glad that there is argument. That  
16 the waiver — there was a waiver that was given. And I think  
17 we can all agree that a waiver — you don't have to give up  
18 all of your attorney-client relationship in order to meet the  
19 burden of the reliance, so there was no assertion of privilege  
20 on anything that was covered by this area on the reliance.

21 And so — and if there was an issue — and that's why  
22 reading this deposition — Mr. Hulings did the deposition from  
23 our side. If there was an issue, the record is complete with  
24 Mr. Hulings taking a break, coming back after conferring with  
25 Mr. Mueller, and say, okay, this would be within the scope.

1 You can answer.

2 So some of the examples of what Your Honor is  
3 mentioning was actually before that happened, Mr. Mueller  
4 reentered and answered some of those questions. Some he  
5 didn't. So, for example, there wasn't a waiver on post-2019  
6 discussions, because that's not relevant to their claims or  
7 defenses. There wasn't a waiver on the SEC investigation.  
8 That's not relevant -- I think we can all agree -- to their  
9 claims or defenses.

10 So the waiver of attorney-client privilege was even  
11 broader than necessary to match these issues on this advice.  
12 And if they didn't agree with anything of that; for example --  
13 I don't recall, because I wasn't there. I think Mr. Nasse may  
14 have been in those depositions with Mr. Mueller. There was a  
15 discussion -- because I've read the transcript a few times --  
16 there was a discussion between Mr. Hulings and Mr. Nasse where  
17 they said, well, we disagree with this exertion of privilege.  
18 We'll take that up with the Court.

19 That never happened. So if there was a dispute about  
20 the scope of privilege or the -- or that then it could have  
21 been taken up, but on a motion in limine to say King's X, even  
22 though I've got sworn testimony from Mueller and Concilla and  
23 I've got a waiver, you can't put any of that evidence on,  
24 Judge, would just not, in our view, be an appropriate result.

25 THE COURT: What about the accountants? Are you

1 going to try to argue that accountants gave some kind of  
2 accounting advice that's relevant here?

3 MR. DAVIS: Well, we are, depending upon their  
4 theory. Again, the SEC has kind of molded their theory, and  
5 now it's more limited. So I don't know if they are going to  
6 get into the fact of how Mr. Mueller received compensation, or  
7 what's noncompensation or loan proceeds. If they are, then we  
8 need to show that he was advised to book it that way by  
9 accountants. If they are not, then we don't need to.

10 So if that comes up, Judge, if they say,  
11 "Mr. Mueller, why was this booked as a loan or AR?" Then I  
12 think it's undisputed that the accountants provided him that  
13 advice to do that, and he testified to it.

14 If they are not going to get into that, then I don't  
15 think we need the accountants.

16 THE COURT: But I thought they testified that they  
17 never provided any kind of tax or other advice concerning  
18 compliance of security laws. Is that true or not?

19 MR. DAVIS: That may be true, but that's not the  
20 point on the money coming out. What they did do is prepare  
21 the tax returns. And what they did do is prepare those tax  
22 returns consistent with how Mr. Mueller received these funds.  
23 He didn't prepare the tax returns.

24 So the securities laws, we are not going to ask an  
25 accountant to talk about securities laws. But if they're

1 getting into, "Hey, why did you take -- why was this booked as  
2 a loan as opposed to W-2 comp or something else" --

3 THE COURT: Well, I'm confused. Why does that all  
4 come into this case?

5 MR. DAVIS: I don't think it should.

6 THE COURT: What's the government say?

7 MR. NASSE: Yeah, I don't think that's our position.

8 It was our view that, based on some of their witness  
9 designations, Your Honor, that they were going to say, well,  
10 the accountant said it was a loan; therefore, it was  
11 permissible. And our claim is that it may have been  
12 permissible under the tax code, but it wasn't done necessarily  
13 in accordance with the PPM and the disclosures to investors.

14 Introducing that evidence of an accountant is undue  
15 privilege that will tell -- you know, indicate to the jury  
16 that there was some advice maybe that related to securities  
17 compliance, because it's a professional, and we just think  
18 that's an undue prejudice, given the fact that the actual is  
19 relevant.

20 THE COURT: Respond to that.

21 MR. DAVIS: Yes. I don't think we are going to offer  
22 testimony of an accountant to say that loans were consistent  
23 with securities laws or the PPM. So that's not -- I think  
24 we're missing each other there. We'd like to keep them on  
25 board, because if they go forward and say, well, you received

1 your compensation based on the tax laws in a different way,  
2 then that's why we would call them. It sounds like they are  
3 not planning on doing that, so maybe we just saved half a day  
4 of trial.

5 MR. NASSE: The only concern with that, Your Honor, I  
6 think is if Mr. Mueller gets up and testifies and says, Well,  
7 I ran this by my accountant, and they said it was -- you  
8 know --

9 THE COURT: Yes.

10 MR. NASSE: -- appropriate.

11 THE COURT: The ruling right now on that one, on  
12 reliance of accountant -- that's the motion in limine by the  
13 government -- is granted.

14 Now, let's go back to the attorneys. I'm really  
15 wrestling with this. I'm concerned that if I deny it at this  
16 stage -- and again, this is just a motion in limine. So it's  
17 not -- but I think I need to provide you enough guidance as to  
18 how we're going to go forward in trial.

19 This is a very close call, and since it's such a  
20 close call, I'll allow the lawyers to come up and then  
21 Mr. Mueller to come up and say what they have to say, and  
22 we'll see whether it's enough to get a jury instruction. And  
23 if it's not, the risk from the defendants' perspective is I'll  
24 also instruct the jury to disregard all the evidence that they  
25 heard on that point.

1 MR. DAVIS: And Judge, we'll -- we understand the  
2 Court's ruling. We'll take that up at the time. There is  
3 some case law that says, look, even if you don't get the  
4 instruction, it can go towards your state of mind and good  
5 faith, but we'll take that up at the time, Judge.

6 In terms of the instruction not to consider, I don't  
7 think we have to get into that now, but at that time, Judge,  
8 we'll reserve our right to show you some authority on that  
9 point.

10 THE COURT: I got it. Thank you.

11 Number five, undisclosed opinion testimony. Is there  
12 any such?

13 MR. DAVIS: I'm going to let Ms. Small address that  
14 one, Your Honor, with the Court's permission.

15 MS. SMALL: Good morning, Your Honor. Caroline Small  
16 for the defendant.

17 To your point, there is no undisclosed expert  
18 testimony. We timely disclosed our four nonretained experts  
19 on April 6th. There's been no --

20 THE COURT: So this motion in limine is only talking  
21 about Craig Rushford [sic], I believe, right?

22 MS. SMALL: He was disclosed, Your Honor, on  
23 April 6th. They took his deposition two months later in June.  
24 So he has been disclosed. There was never any *Daubert*  
25 challenge or any pretrial motion on these folks regarding the

1 exclude all of the witnesses pursuant to Federal Rule of  
2 Evidence 615, with one exception, which would be our expert  
3 Mr. Post, and ask him to be able to watch the testimony.

4 THE COURT: Experts are excused from the rule.

5 MR. DIVINE: I believe that's all we have, Your  
6 Honor. Thank you for your patience.

7 MR. DAVIS: That's it, Judge. Thank you.

8 THE COURT: We'll see you-all.

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10 I certify that the foregoing is a correct transcript from  
11 the record of proceedings in the above-entitled matter. I  
12 further certify that the transcript fees and format comply  
13 with those prescribed by the Court and the Judicial Conference  
14 of the United States.

15  
16 Date: 12/04/23

17 /s/ *Gigi Simcox*  
18 United States Court Reporter  
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